***United States Court of Appeals***

***for the Second Circuit***


# APPELLEE'S BRIEF

# 75-4231

ORIGINAL

*To be argued by*
RAYMOND G. KRUSE

In The

## United States Court of Appeals

For The Second Circuit

NATIONAL LABOR RELATIONS BOARD,

*Petitioner,*

*vs.*

AMSHU ASSOCIATES, INC.,

*Respondent.*

*In Opposition on Application for Enforcement of an Order of the National Labor Relations Board*

# BRIEF FOR RESPONDENT

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P/s



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-against-

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# BRIEF FOR RESPONDENT

## STATEMENT OF THE ISSUES PRESENTED

1. Whether respondent Spring Valley Gardens Associates violated Section 8 (a) (1) of the Act by allegedly interrogating Elisha Carr with respect to his membership in behalf of the Building Service Employees International Union Local 32E, AFL-CIO hereinafter called the union.

2. Whether respondent Amshu Associates Inc. hereinafter referred to as Amshu violated Section 8 (a) (1) of the Act through statements allegedly made to Thomas Hopkins in the latter part of June 1974 in reference to joining the union.

3. Whether Thomas Hopkins was discharged because of

his membership in the union in violation of Section 8 (a) (3) of the Act.

4. Whether respondent Amshu Associates, Inc. and Spring Valley Gardens constitute a single employer.

## PRELIMINARY STATEMENT

### The Companies

Amshu Associates, Inc. is a New York corporation with offices at Woodbridge, New Jersey and on Kennedy Boulevard, Spring Valley, New York where it is engaged in the construction and operation of various types of residential buildings, forming a single complex known as Sleepy Hollow Gardens. The shareholders of Amshu Associates, Inc. are Sam Halpern, Arie Halpern, Joe Wilf, Harry Wilf, Jacob Burstyn, Meyer Gold and Mark Weidman (A87).

Spring Valley Gardens Associates is a partnership which owns and operates Spring Valley Gardens Apartments in Spring Valley, a separate and distinct complex located several miles away from Sleepy Hollow Gardens. Spring Valley Gardens has offices in Woodbridge, New Jersey and on Sneden Place in Spring Valley, New York. The partners of Spring Valley Gardens are Sam Halpern, Arie Halpern, Joe Wilf, Harry Wilf,

Jacob Burstyn, Meyer Gold, Mark Weidman, Fred Halpern and Leonard Wilf.

Thomas Hopkins

Thomas Hopkins was hired in September of 1973 as "resident superintendent" for Sleepy Hollow Gardens Apartments (A36). The term "resident superintendent" is a word of art in the real estate business meaning a superintendent who is provided with an apartment as part of his wages and who is expected to reside on the premises with spouse if married (A189). Thomas Hopkins would not have been hired by Amshu had he not been married, nor would he have been hired unless he agreed that both he and his wife would reside on the premises. It was a prime condition of employment (A174, 179).

Hopkins commenced his duties as superintendent in September of 1973 (A36). Hopkins never, in fact, moved his wife into the apartment (A216 and 191). When Hopkins moved into the apartment initially, occupancy of a few apartments was commencing. As time progressed and more apartments were completed and occupied, Hopkins was given a raise in December and then in May (A247-24[illegible]).

From the time he was hired until the time he was fired,

Hopkins was asked on numerous occasions when he was going to move his wife in and he was told on numerous occasions that he must move his wife in in order to maintain the job (A190-192, 204-05, 211-212, 216-219, 163-164).

Every effort was made to show good faith on the employer's part both by giving Hopkins raises and by providing him with full time assistance (A177-178, 247-254, 165 and 200-201).

Numerous witnesses testified that Hopkins had virtually no furniture in his apartment and that the space in the apartment was taken up primarily with various tools, supplies and materials (A162-163, 186-189, 223, 224-225, 249, 229-230, 143-148, 179-180, 253-258). The witnesses testifying to the aforementioned were David Halpern and Mark Weidman, officials of the company, Adam Fortunato and Thomas Dobutovic, employees of the company and Gary Smith, Dr. Lawrence Gordon and Steven Andleman, residents of the apartment. Of these, Halpern, Weidman, Fortunato, Dobutovic and Smith visited the bedroom at various times during the entire period Hopkins worked at Sleepy Hollow Gardens. None ever saw any bedroom furniture. All of the witnesses testifying above, testified of seeing, not a couch as described by Mrs. Hopkins in the living room (A80-82), but an army type cot with sheets and a blanket on

it in the living room. The above testimony of all of these witnesses include descriptions of paint cans and tools all over the apartment together with materials on the floor and in the closets. None ever saw the leather stuffed chairs or end tables described by Mrs. Hopkins. Storage areas other than Hopkins' apartment were available (A189 and 158-159).

As time passed and Hopkins still did not bring his wife into live with him at the apartment, the respondent Amshu began looking for a new superintendent. Consequently an advertisement was placed in the Rockland County Journal News which ran for one week, seeking a resident superintendent for Sleepy Hollow Gardens in March of 1974 (A298). In late April or early May of 1974 David Halpern interviewed Mr. & Mrs. Serur for the resident superintendent job at Sleepy Hollow Gardens (A114) and in June of 1974 they were interviewed by Mr. Weidman for the same job (A161-162, 201-202). Since Mr. & Mrs. Serur would not be available until sometime after July to commence employment, Simon Wizman was interviewed for the job and hired in early June and told he would commence his employment on July 1st (A16-17; 210).

Hopkins joined the union on June 24, 1974 (A263). The following day Mr. Childers, a union representative, told

Mark Weidman, in the presence of Amshu's attorney, that Hopkins had signed up with the union. Weidman's immediate retort was that Hopkins had already been replaced because he had not been living on the premises with his wife (A265).

Wizman commenced work on July 1, 1974. The formal letter of discharge was given to Hopkins on July 8th and Hopkins last day of employment was July 22, 1974 (A208).

Elisha Carr at Spring Valley Gardens

Elisha Carr was employed by Spring Valley Gardens as a laborer and David Bleiberg was employed by Spring Valley Gardens at the same time as a construction superintendent (A138). During the course of this employment Carr claims that Bleiberg walked up to him one day and asked "Did you join the Union?" to which Carr answered "No" and Bleiberg replied "I heard you did". Carr then supposedly said "I signed the card for the union" to which Bleiberg replied "Oh" (A140-141). Bleiberg denies this conversation ever took place (A182-183 and 184-185). Thereafter Carr was laid off because of a work cutback.

## ARGUMENT

### POINT I

### AMSHU ASSOCIATES, INC. AND SPRING VALLEY GARDENS ASSOCIATES ARE SEPARATE AND DISTINCT EMPLOYERS.

Amshu and Spring Valley Gardens are two separate legal entities, Amshu being a corporation while Spring Valley Gardens is a partnership. While each has principals who hold an interest in both, Spring Valley Gardens has additional principals.

Decisions for hiring and firing, for wages and working conditions are made on a case by case basis by the shareholders or the partners of the respective entities (A87 and 89-90); each maintains separate renting facilities though they are located in the same village (A87-88, and 99-102); the benefits for employees of the two entities differ (A91-92); bookkeeping, banking, payrolls and financing of the two companies are kept entirely separate (A94). The various shareholders and partners are also involved with various other partners in other real estate ventures (A102-103).

All of the partners and shareholders live in New Jersey except Mark Weidman who tells Sam Halpern how he wishes to vote and leaves a proxy with Halpern. Halpern then contacts the other partners who actually cast their votes on the

respective decisions.

While the companies share the same physical facilities in Woodbridge, these facilities are also shared by approximately 40 other real estate companies who share the expenses for the purpose of convenience and economy (A94).

As will be demonstrated more extensively in other parts of this brief, the decision from which this appeal is made, reaches conclusions which are simply not based upon the facts or evidence presented. Thus, we find "Mark Weidman testified that a number of other companies utilized the same staff at the same location. In the absence of other evidence, the record would leave me to believe that these other companies likely involved many of the same persons involved with respondents" (A6). The record simply does not support such an inference.

The testimony shows that the hiring and firing in Spring Valley Gardens as well as Sleepy Hollow Gardens is done on an ad hoc basis by the owners of each and that these owners are not the same in each instance. In addition the salaries and benefits and the work hours and work days are not the same at each location (A92).

This court held, in a decision dealing with Section 8

(b) (4) (B) [29 USC 158 (b) (4) (B)] that the intergration of operations of two companies on a merely functional plane is an improper basis for concluding that both have primary employer status. NLRB v. Milk Drivers and Dairy Employees Local Union, etc. (1965 CA2) 341 F2d 29, cert. den. 382 US 816, 15 LEd2d 64, 86 S.Ct. 39.

## POINT II

### THE DISCHARGE OF THOMAS HOPKINS DOES NOT CONSTITUTE AN UNFAIR LABOR PRACTICE.

The question before the trial examiner and ultimately before this Court is not "was Thomas Hopkins discharged for just cause" but, rather, "was Thomas Hopkins fired because of the anti-union animus of the employer".

While much testimony was given concerning whether or not Hopkins resided on the premises during the time of his employ, the crucial evidence in this case is that it establishes when the employer made the decision to discharge Hopkins. Even if we assume, arguendo, that Hopkins in fact lived on the premises as he claimed and that the employer was mistaken or even acted in bad faith in reaching its decision to fire him, it is the employer's contention that as long as the decision to fire him was made prior to his first contact with the

union, the discharge could not have been one based on anti-union animus.

As conceded by the petitioner, Hopkins signed up with the Building Service Employees International Union Local 32E, AFL-CIO (hereafter called "the union") on June 24, 1974 (A10; 40-41, 56-57, 66, 67, 69, 71-72, 262-264). The record is devoid of any inference that Hopkins made any prior contact with the union in reference to the respondent Amshu that Amshu knew about or could have known about. The union alleges to have sent, on the same date, a letter to Amshu demanding recognition at Sleepy Hollow Gardens (A10; 292, 72). The following day at a meeting for purposes unrelated to to the instant case, a union representative, Childers, informed an Amshu official, Weidman, that Hopkins had signed up with the union. Weidman immediately replied that he intended to discharge Hopkins because "he is not living there. He didn't move in" (A11; 264, 211). The conclusion is inescapable from the record that Weidman did not make this statement as a spur of the moment gambit.

In March of 1974 Amshu had placed an advertisement in the Rockland County Journal News, which ran for one week, seeking a resident superintendent for Sleepy Hollow Gardens

(A161, 298).

The petitioner called to the stand, as one of its witnesses, Mrs. Leah Serur to testify in behalf of the government's case. Since she was an unsuccessful job applicant to the respondent Amshu, there is no indication that she was other than a friendly witness for the petitioner and a hostile witness to the respondent and the record is supportive of this. Her testimony, nonetheless was that in late April or early May of 1974 David Halpern, a principal of Amshu, interviewed Mrs. Serur and her husband for the resident superintendent job at Sleepy Hollow Gardens (A169-1) and in early June of 1974, prior to Hopkins first contact with the union, that they were interviewed by Mr. Weidman for the same job (A161-162 and 201-202). There is no question from her testimony but that Mrs. Serur was being interviewed for the Sleepy Hollow Gardens job. Since Mr. and Mrs. Serur both stated they would not be available until sometime after July to commence employment, a third party, one Simon Wizman, was interviewed and hired for the job in early June and told he would commence his employment on July 1st which he did (A199-200).

The hearing examiner refers to the interview with the

Serurs and reaches the conclusion that the interview must have been for some other job. There is nothing in the testimony to indicate that some other job was open and the conclusion ignores Mrs. Serur's own statement. Mrs. Serur states directly in the transcript that the interview concerned the resident superintendent job at Sleepy Hollow Gardens (A111).

The reviewing court may set aside a board order when "it cannot conscientiously find that the evidence supporting the decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the board's view". (Universal Camera v. NLRB, 1951 U.S. Sup. Ct. (1951) 340 US 474, 71 S. Ct. 456, 27 LRRM 2373 at 2378).

Here we do not have a choice between two conflicting views which might be adopted. Here we have uncontroverted evidence which is clearly at odds with the board's conclusion. The hearing examiner attempts to "reconcile" this with his conclusion by saying in effect "since those facts are incompatible with my conclusion, they must mean something else even though the petitioner placed nothing on the record to enable me to so find". The examiner's apparent conclusion that the newspaper advertisement must have applied to some

other building is not supported by the record and on that count is purely gratuitous.

Toward the end of March 1974 and at least on the date March 22, 1974, there appeared in the newspaper "The Journal News" an advertisement reading "Superintendent-Resident; garden apartments, experienced, good references. Call weekdays 9 to 4:30, 352-5252". The interview with Leah Serur and her husband for the opening at Sleepy Hollow Gardens took place in early June and was conducted at Sleepy Hollow Gardens. They were shown around Sleepy Hollow Gardens after the interview (A111).

The ad specified "garden apartments". Hopkins testified that Sleepy Hollow Gardens was a garden apartment (A38). The record is devoid of any indication that Spring Valley Gardens is a garden apartment or, indeed that the employer owned any other garden apartments. For the hearing examiner to so conclude because they conflict with his decision has the same effect of permitting him to be a witness and, thus, to make the facts, rather than to decide them. It is up to the attorney for the petitioner to establish by cross-examination or direct presentation facts upon which the trial examiner may base his conclusions if they are to be contrary to those

presented by the respondent. The employer is not required to foreclose every possible loophole through which an opposite inference, no matter how obscure, may be drawn and, in failing to do so, the hearing examiner is then free to conclude that the evidence stated is rejected because it is not proved beyond a shadow of a doubt, or where it is too strong to be rejected, will be deemed to mean something else.

Mr. Halpern testified that the ad was for Sleepy Hollow Gardens (A161).

Sleepy Hollow Gardens and Spring Valley Gardens each have separate working offices in Spring Valley (A88, 100).

The number 352-5252 was and still is the telephone for Amshu (A247). There is and was a separate number listed in the telephone directory for Spring Valley Gardens.

The renting office for Spring Valley Gardens is in one of the apartments on that premises (A87-88). Sleepy Hollow Gardens and the adjoining high rise apartments, Country Village Towers are several miles away from Spring Valley Gardens (A161).

The offices for Amshu were located in the high rise complex, first at One Luney Court and then at Ten Garrison Drive (A88).

Weidman went into these offices with the Serur's to make a telephone call after interviewing them at his house and after showing them around the Sleepy Hollow Gardens complex, according to Mrs. Serur (A111).

Shortly after the ad came out in the newspaper the Serur's were initially interviewed by Dave Halpern (A113-114, 160).

The decision holds forth that since Mrs. Serur recollects being told that there was a union problem concerning the superintendent her husband was to replace, that the job would not be open for a few weeks, this means the interview could not have been for Sleepy Hollow Gardens; that the ad for the garden apartments with the Amshu telephone number in March must have been for some other complex although there was no evidence any other such complex existed; that Mrs. Serur must have been shown around some other complex than Sleepy Hollow Gardens and that she didn't go into the high rise next door and that her unequivocal "Yes" to the question of whether she was sure it was the superintendent of Sleepy Hollow that was to be replaced are all ipso facto in error. Surely, such an interpretation contorts the record as a whole and is plainly contrary to it. It could very well be that Mrs.

Serur was told this by Mr. Weidman in the June 19 interview because he did not want to give her a flat rejection on the job because of her unavailability until mid-July and used that as an excuse for not doing so. But the more probable explanation is once again available from the record as a whole. The reading of Mrs. Serur's entire testimony shows she was notoriously bad on remembering sequences of events (A104-114). In her direct testimony she testified that her initial interview with Amshu was in early June with Mr. Weidman. Under cross-examination she adjusts this back by at least a month to an interview and some telephone conversations with Mr. Halpern. Her testimony implied two telephone calls with Weidman in June and then she straightened this out to one in June and one in July. It is most likely she was mistaken on when she was told about the problem with the union and that it was actually in the July conversation.

Again in the Universal Camera case, supra, at page 2378 of 27 LRRM, the Supreme Court said "whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence

from which conflicting inferences could be drawn, the new legislation definitely precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is the clear meaning of the reference in both statutes to 'the whole record'."

It is submitted in behalf of the respondent that the whole record clearly indicates that as far as the employer's decision to fire Hopkins, the die had already been cast by June 24th, 1974 and that even assuming, arguendo, that everything Hopkins and his witnesses said was true, it could not have constituted an unfair labor practice.

## POINT III

### IN LIGHT OF THE RECORD AS A WHOLE HOPKINS TESTIMONY OF WEIDMAN'S STATEMENT IN VIOLATION OF 8 (a) (1) IS PLAINLY INCREDIBLE.

In formulating its decision in the Universal Camera case, supra, the Supreme Court stated on page 2377 of 27 LRRM, in reference to the history of the Administrative Procedure Act which it was considering:

> "The committee reports of both houses refer to the practice of agencies to rely upon 'suspicion, surmise, implications, or plainly incredible evidence,' and indicate that courts are to exact higher standards 'in the exercise of their independent judgement' and on consideration of 'the whole record.'"

According to union representative Childers, who testified in behalf of the petitioner he had a conversation with Mr. Weidman, the representative of the respondent Amshu on June 25, 1974 which is the day after Hopkins is alleged to have signed up with tne union. Immediately upon Childers telling Weidman that Hopkins had signed up with the union Weidman retorted that he was in the process of firing Hopkins because Hopkins did not live on the premises as he was supposed to (A265-266). This is consistent with the uncontroverted fact of the resident superintendent advertisement appearing in the

newspaper in March, the testimony of Leah Serur that she was being interviewed for the job of resident superintendent at Sleepy Hollow Gardens where Hopkins worked in early June and with Weidman's testimony that he had also interviewed Simon Wizman in early June or mid-June. It is also consistent with the uncontroverted fact that Simon Wizman began employment in the complex on July 1st, 1974, and thereafter took over as superintendent when Hopkins left (A210).

Hopkins testimony is that somewhere around June 28th that the conversation with Weidman took place wherein Weidman supposedly said "I see you joined the GD union," and "well you won't be around here very long" (A42).

Assuming this testimony to be true, the testimony of Childers clearly indicates that the die was cast and it could hardly constitute an interference, restraint or coercion. The statement Weidman made to Childers was unequivocal. It came spontaneously upon Childers telling Weidman that Hopkins had joined the union. Obviously Childers did not interpret Weidman's response, that Hopkins was being replaced because he was not residing at the complex, as a remark showing anti-union animus. In other words, he did not interpret Weidman's telling him that he was firing Hopkins as a veiled threat because

Hopkins had joined the union. Had Childers done so it is reasonable to assume that Weidman's response to Childers on the 25th of June would also have been charged under 8 (a) (1).

In light of the record as a whole, however, Hopkins contention that Weidman said that he was going to find some way to get rid of him, at the late date at which Hopkins claims it to have been made, is clearly incredible. But again assuming it had been made it is hardly likely that the remark could have been intended or interpreted to interfere, restraint or coerce Hopkins as to his union activities since Weidman had already committed himself to firing Hopkins for not residing on the premises to Childers four days earlier.

## POINT IV

ASSUMING THE CONVERSATION WITH CARR HAD TAKEN PLACE AS REPORTED BY CARR, IT WOULD NOT, AS A MATTER OF LAW, CONSTITUTE A VIOLATION OF 8 (a) (1).

Elisha Carr was employed at Spring Valley Gardens for about a year and he was laid off in February of 1974, according to his testimony (A139). Prior to his layoff Carr testifies as to the following occurrence (A141):

> "I was working in the courtyard there, and Mr. Bleiberg came up to me and asked me 'did you join the union?' So I said, 'No.' He said 'I heard you did.' I said, 'I signed a card for the union.' He said, 'Oh' and walked away."

This is all that the record contains as to the occurrence which is supposed to constitute the 8 (a) (1) violation. There is no indication that there was any hostility in Bleiberg's manner or approach when he supposedly asked the question. There is no contention by the petitioner that the layoff of Carr, which could have come as much as a month after the alleged questioning, was a violation of the Act (A142).

Section 8 (c), (29 USC 158 (c)) permits:

> "the expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be

> evidence of an unfair labor practice under any of the provisions of this Act [29 USC Sections 151-158, 159-168], if such expression contains no threat of reprisal or force or promise of benefit."

In NLRB v. Armour & Co. (1954, CA5) 213 F 2d 625 the court held that infrequent inquiries by supervisors as to employees' interest in a union did not constitute interference or restraint. The same court held that casual and moderate inquiries by an employer concerning employees' union preference, absent evidence indicating the employees' having reason to consider questions and statements as forecasting reprisals, do not constitute an unfair labor practice (NLRB v. McGahey (1956, CA 5) 233 F 2d 406).

Mere words of interrogation not threatening or intimdating in themselves, made by an employer with no anti-union background and not associated with a pattern of conduct hostile to unionism or with espionage upon employees, cannot, standing alone, support a finding of an unfair labor practice. NLRB v. Prince Macaroni Mfg. Co. (1964, CA 1) 329 F 2d 803; NLRB v. Lorben Corp. (1965, CA 2) 345 F 2d 346; NLRB v. Sellers (1965, CA 9) 346 F 2d 625; NLRB v. Bin-Dicator Co. (1966, CA 6) 356 F 2d 210; NLRB v. McCormick Concrete Co. of S.C., Inc. (1967 CA 4) 371 F 2d 149; National Can Corp. v. NLRB (1967, CA 7) 347 F 2d 796; NLRB v.

Ralph Printing and Lithographing Co. (1967, CA 8) 379 F 2d 687; NLRB v. Miami Coca Cola Bottling Co. (1967 CA 5) 382 F 2d 921.

In this court it was held that an employer's inquiries of his employees, to the extent that they do not constitute a threat or intimidation, or promise of favor or benefit in return for resistance to a union, are permissible under 29 USC 158 (c) (NLRB v. Montgomery Ward & Co. (1951 CA 2) 192 F 2d 160).

This court further held that interrogation, not itself threatening, is not an unfair labor practice unless fairly severe standards are met including such areas as background, nature of the information sought, identity of the questioner, and the place and method of interrogation and the truthfulness of the reply (J.J. Newberry Company v. NLRB (1971 CA 2) 442 F 2d 897). Certainly the facts in this case indicate the most casual and singular inquiry made in passing with the employee feeling no hesitation in replying in a straightforward and forthright manner. When asked if he had joined the union he said no and then he stated he had signed a card for the union which we may assume was a pledge card although the inquirer made no effort to even determine that.

## CONCLUSION

For the foregoing reasons, it is respectfully requested that the motion to enforce the Board's order be denied.

Respectfully submitted,

RAYMOND G. KRUSE
Attorney for Respondent

A 201 Affidavit of Service by Mail — LUTZ APPELLATE PRINTERS, INC.

UNTIED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BROAD,
Petitioner,

- against -

AMSHU ASSOCIATES, INC.,
Respondent.

*Index No.*

*Affidavit of Service by Mail*

*STATE OF NEW YORK, COUNTY OF* NEW YORK *ss.:*

*I,* Velma N. Howe *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 298 Macon Street, Brooklyn, New York 11216

*That on the* 9th *day of* April *19* 76, *deponent served the annexed* Respondent Biref *upon* John S. Irving General Counsel *attorney(s) for* Petitioner *in this action, at* National Labor, Relations Broad, Washington, D.C, *the address designated by said attorney(s) for that purpose by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.*

*Sworn to before me, this* 9th *day of* April *19* 76.

Velma N. Howe

VELMA N. HOWE

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977